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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON RIMMER,

Defendant and Appellant.

2d Crim. No. B208075
(Super. Ct. No. 2007022503)
(Ventura County)

Jason Rimmer entered a plea of guilty to grand theft (Pen. Code, § 487, subd. (a))¹ and admitted he took more than \$150,000 within the meaning of section 12022.6, subdivisions (a)(2) and (b). The trial court denied his request for probation and sentenced him to two years in state prison. Rimmer contends on appeal that the trial court erred when it failed to state it considered the probation report, and abused its discretion when it denied his request for probation. We affirm.

FACTS

Rimmer worked for Amgen. Rimmer and a friend, Robert Nipar, schemed to steal from Amgen by submitting fictitious invoices for services. Rimmer approved the bills and payment was made to Nipar. The amount taken from Amgen exceeded \$300,000.

¹ All statutory references are to the Penal Code.

Prior to being discovered, Rimmer quit his job and found new employment. Eventually, Amgen discovered the theft. The police contacted Rimmer. Rimmer denied any wrongdoing and asserted that all the payments were legitimate.

Rimmer and Nipar were arrested and charged. Rimmer made restitution to Amgen of \$150,000 prior to pleading guilty.

DISCUSSION

I

Rimmer contends the trial court committed procedural error when it failed to state it considered the probation report prior to sentencing.

Section 1203, subdivision (b)(3), provides that at the hearing on an application for probation, the court "shall make a statement that it considered the [probation] report." Here at sentencing, the trial court stated it "read" the probation report, but did not expressly state it "considered" the report.

Rimmer relies on *People v. Arredondo* (1975) 52 Cal.App.3d 973, 981, for the proposition that the trial court's failure to expressly certify that it considered the probation report is reversible per se. But there the trial court erroneously believed that it had no discretion to grant probation. Thus there was nothing in the record to show it considered the report.

Similarly, in *People v. Rojas* (1961) 57 Cal.2d 676, the trial court refused to refer the matter to the probation department for a current report. Thus there was no report for the court to consider. *Rojas* does not stand for the proposition that the trial court must expressly use the word "considered."

The rule in *People v. Gorley* (1988) 203 Cal.App.3d 498 is applicable here. There the court stated: "We believe the purpose of the certification required by section 1203, subdivision (b), is sufficiently served and remand is not required if the record otherwise clearly shows that the court has read the RPO [probation report] or has considered the information provided in it." (*Id.* at pp. 506-507.) Because the trial court here stated that it read the probation report, no remand is necessary.

II

Rimmer contends the trial court abused its discretion in denying him probation.

Rimmer acknowledges that because he stole over \$100,000, he is ineligible for probation unless the court finds his is the unusual case where the interests of justice will be best served by a grant of probation. (§ 1203.045, subd. (a).)

California Rules of Court, rule 4.413 sets forth factors the court may consider in determining whether it is an unusual case allowing a grant of probation.² One factor is that the facts or circumstances giving rise to the limitation on probation are substantially less serious than the circumstances typically present in such cases. (*Id.* at (c)(1)(A).)

If the court determines that the statutory limitation on probation is overcome, the court should apply the criteria in rule 4.414 to decide whether to grant probation (rule 4.413(b)). The criteria in rule 4.414 include: the circumstances of the crime compared to other instances of the same crime; degree of monetary loss to the victim; whether the defendant was an active participant; whether the defendant demonstrated criminal sophistication or professionalism; and whether the defendant took advantage of a position of trust or confidence.

Rimmer argues that because he made his full proportional share of restitution to Amgen his case is substantially less serious than the typical case. Thus he claims he qualifies for probation under rule 4.413(c)(1)(A). He relies on section 513, which provides that where a person voluntarily makes restitution prior to an information or indictment, the court is authorized at its discretion to mitigate punishment. He points out that although a felony complaint was filed against him, it was not certified as an information.

But the trial court was well aware that Rimmer had made restitution of \$150,000. Both the prosecutor and defense attorney pointed it out to the court, and

²All further reference to rules are to the California Rules of Court.

Rimmer's brother told the court that he loaned him the money. Rimmer cites no authority that required the trial court to find that restitution made this case substantially less serious than the usual case. Section 513 leaves leniency to the trial court's discretion.

Even if the trial court were required to find this case qualifies under rule 4.413 (c)(1)(A), a number of the factors listed in rule 4.414 militate against a grant of probation even where restitution is made. Rimmer was an active participant, the circumstances of the crime demonstrated criminal sophistication and he took advantage of a position of trust and confidence. There is simply no showing of an abuse of discretion.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Bruce A. Clark, Judge
Superior Court County of Ventura

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Defendant and Appellant.

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